Supreme Court, U. S.
FILED
AUG 29 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1977

NO. 77-177

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,

Petitioner,

vs.

SIGMUND G. ZAWACKI,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

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RULE CITED

Rule 56, Federal Rules of Civil Procedure 2, 6, 8

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When counsel for Petitioner, Provident Life and Accident Insurance Company, was asked on oral argument by the Judges of the Sixth Circuit Court of Appeals why this relatively basic contract action had been removed by Provident from the Wayne County, Michigan, Circuit Court to the Federal District Court, counsel replied to the effect that Provident decided on the removal because it was assured of a higher calibre of judicial officer in the

Federal system. Apparently, counsel would now except from that statement at least three Judges of the Sixth Circuit.

Petitioner asserts to this Court that "this petition presents an important question relating to the scope and applicability of Fed R Civ P 56, governing summary judgment, and relating to appellate review of its judgment rendered thereunder". An examination of Petitioner's complaint relating to the actions of the Appeals Court panel discloses nothing more than a petulant claim that the Court of Appeals did not write a full-blown formal opinion in returning the matter to the District Court for ultimate trial.

The short answer to Petitioner's complaint is that the Court Rules do not require the extended form of opinion Petitioner appears to prefer. The practical answer to Petitioner's complaint is that the opinion of the Court of Appeals, taken together with the pleadings, briefs and oral arguments, is adequate and clear to all affected parties.

THE BASIC FACTS ARE CONTROVERTED BY PETITIONER

The contract clause at issue in this matter provides:

> "No Accidental Death Insurance shall be payable for any loss caused directly or indirectly, wholly or partly by:
>
> "(a) Mental infirmity, ptomaines, bacterial infections (except pyogenic infections which shall occur

> simultaneously with and through an accidental cut or wound), or any kind of sickness or disease."

The Court of Appeals, in reversing summary judgment for Defendant-Appellant, stated that "facts developed thus far do not appear to be sufficiently uncontroverted to warrant summary judgment," (Appendix B).

By way of example, Respondent pleaded, paragraph 13 in his complaint:

> "That the staphylococcus aureaus, which primarily caused Ann O. Zawacki's death, was a bacterial pyogenic infection which occurred simultaneously with and through the accidental wound in her left hip."

Paragraph 13 of Petitioner's answer states:

> "PROVIDENT denies the allegations in paragraph 13."

Petitioner's denial of the fundamental facts which are at issue in determining the question of coverage liability has never been withdrawn by Petitioner. Respondent's burden as plaintiff is to establish that the accidental death of his wife was caused directly or indirectly, wholly or partly, by a pyogenic infection which occurred simultaneously with and through an accidental cut or wound. Whether the death was caused by accidental means, whether it was caused directly or indirectly or wholly or partly by a pyogenic infection and whether the pyogenic infection occurred simultaneously with and through an accidental cut or wound are all questions of fact which, unless properly admitted by Petitioner as defendant, are to be resolved by the trier of the facts.

A jury demand has been filed in this case and the ultimate trier of the facts at issue is the jury, not the

District Court. That Petitioner seems somewhat confused on this point, see page 5 of its Petition wherein it stated that "The Court found, in essence, that Respondent's decedent's death did not occur as a result of 'pyogenic infections which shall occur simultaneously with and through an accidental cut or wound.'" This supposed "finding" is, of course, the heart of the lawsuit and not within the District Court's power where a jury has been demanded. The effect of such a "finding" is to deprive Respondent of his right to a jury determination of contested facts.

Until Petitioner admits the allegations of paragraph 13 of the complaint, the "facts developed thus far do not appear to be sufficiently uncontroverted to warrant summary judgment," as found by the Court of Appeals.

THE PROVISIONS OF THE INSURANCE CONTRACT

The Court of Appeals also noted (Appendix B to Petitioner, p. 19) "that there is ambiguity in the exception clause relied upon by both parties;" as a basis for reversing the summary judgment granted by the District Court. In attacking that finding by the Court of Appeals, Petitioner, in footnote 3, p. 9, seeks to create the impression that the parties are in agreement that the exception clause is unambiguous because each of the parties claimed that the clause was unambiguous. Of course, what Petitioner does not reveal to the Court is the fact that it claims that the exception clause in question is unambiguous and means one thing, while Respondent claims that the same clause is unambiguous and means something else, and that both parties disagree with the interpretation placed thereon by the District Court, which also claimed the clause to be unambiguous.

The interpretation of the clause by the District Judge is set forth in Appendix A to the Petition. That interpretation is disclaimed by Petitioner, Respondent and the Court of Appeals.

Petitioner's interpretation of the exception clause is that *the pyogenic infection* and *the accident* must occur simultaneously in order for the exception clause to apply. The Respondent would point out that the word "accident" does not even appear in the exception clause.

Respondent's interpretation of those same words is that the events which must occur simultaneously are the occurrences of the infection *with* the cut or wound and *through* the cut or wound. The District Court held (p. 17, Appendix A to Petition) that the accident must precede in time the infection.

In discussing the differences of interpretation of this clause, Petitioner stated in its Brief to the Court of Appeals, pp. 8, 9:

> "Appellant (Respondent herein) says again and again that Provident has conceded that the pyogenic infection occurred 'with and through' the accidental cut or wound. . . . It is apparently Appellant's belief that if he repeats this proposition often enough, it will be somehow deemed true.
>
> "Let there be no mistake on this point. One of the many reasons that Appellant should not recover,

in the circumstances of this case, is that the 'with and through' test, in the operative phrase 'pyogenic infections which shall occur simultaneously *with and through* an accidental cut or wound,' has not been met. That Provident has conceded this issue is only wishful thinking on Appellant's part." (Emphasis added.)

In the conclusion portion of its Brief (p. 12), Petitioner stated:

> "Because the pyogenic infection in this case did not occur at the same time as, and with and through, the event Appellant claims to constitute the 'accidental . . . wound' (Appellant's brief at page 5), and because a pyogenic infection 'shall occur' at the same time as the accident in order for Appellant to recover, Appellant should not recover."

On this record, the holding of the Court of Appeals that there is ambiguity in the exception clause relied upon by both parties is eminently correct.

—o—

THE SUMMARY JUDGMENT PROCEDURE UNDER RULE 56, FEDERAL RULES OF CIVIL PROCEDURE

Petitioner, in questioning the actions of the Court of Appeals, has demonstrated that it is itself confused as to "the scope and applicability" of Rule 56. In its motion for summary judgment, Petitioner stated: "For purposes of this motion only, Provident concedes that 'staphylococcal septicemia' is a pyogenic infection, and Provident confines itself, as to this motion only, to the issue of whether such alleged pyogenic infection occurred 'simultaneously with and through an accidental cut or wound.'"

Thus, the only factual concession made by Petitioner in support of its motion for summary judgment is that staphylococcal septicemia is a pyogenic infection. It does not now concede, and never has conceded, that the pyogenic infection occurred "simultaneously with and through an accidental cut or wound".

Petitioner suggests in the petition, p. 6, that the question of whether the infection occurred simultaneously with and through an accidental cut or wound is a legal question, not a factual question. Yet, on page 5, it asserts that the District Court *found* "that Respondent's decedent's death did not occur as a result of 'pyogenic infections which shall occur simultaneously with and through an accidental cut or wound.'"

Since it is Respondent's contention that the pyogenic infection did occur simultaneously with and through an accidental cut or wound, and since Petitioner refuses to stipulate or admit that the pyogenic infection occurred simultaneously with and through an accidental cut or wound, the "finding" of the Court is directly contrary to the Respondent's allegations alleged in the complaint, and supports Petitioner's denial of those ultimate facts set forth in its answer.

Petitioner has admitted the presence of a pyogenic infection "for purposes of this motion only". This concession would be appropriate only in the situation where the motion for summary judgment is based on the allegation that the opposing party has failed to state a claim upon which relief can be granted. Such a limited con-

cession is not appropriate, under Rule 56, where the Court undertakes to render summary judgment on the ground that "there is no genuine issue as to any material fact". Nor is the District Court empowered under Rule 56 to resolve contested issues of fact.

Petitioner would have this Court resolve this entire matter based upon its one limited concession that "for purposes of this motion only . . . 'staphylococcal septicemia' is a pyogenic infection,". It misrepresents to this Court in the section headed "Reasons for Allowing the Writ", p. 5, that the District Court "gave judgment on undisputed facts to Petitioner." and makes substantially the same misrepresentation subsequently.

The "facts are not sufficiently uncontroverted" because Petitioner controverts the basic facts. Petitioner is not entitled to deny the fundamental facts on the one hand and obtain a summary judgment on the other hand based upon the verity of those same facts. Nor is Rule 56 a device for avoiding a jury determination of disputed facts.

Respondent invites Petitioner to amend the answer filed by it in this case to admit those allegations of fact alleged by Respondent in the complaint. At such point there would be no genuine issue as to any material fact and *either* party would be entitled to bring a motion for summary judgment under Rule 56.

———o———

CONCLUSION

The finding by the Court of Appeals that the matter in the present state of the record is not appropriate for disposition by summary judgment is obviously a correct decision.

Respondent requests that this Court deny Petitioner's application for writ of certiorari.

Respectfully submitted,

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